*LW1210 - Labour and Employment Law*

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*UNIT 2 – Employment Law – CHAPTERS 14 & 15 – Termination of the Employment Contract*

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| *Provincial:* [Quick guide to NL Employment Standards PDF](http://www.nlimmigration.ca/media/2839/employmentstandards.pdf)Provincial: [*Nl Employment Standards*](http://www.gov.nl.ca/lra/faq/labourstandards.html) *FAQ*Provincial: *[Nl Employment Standards Legislation](http://www.gov.nl.ca/lra/agency/legislation.html)* |

# *Termination of the Employment Contract*

Any employer or any employee has the right to end an employment contract provided that certain conditions are met. In this section we look at these conditions.

**Notice of Termination**

Notice of termination has be in writing if an employee has been employed for greater than 3 months. During the first 3 months of employment, no notice of termination is required to be given by either party. As time working builds, notice time builds as well

* For employment from 3 months up to 2 years, 1 week's written notice is required to be given to either party.
* After 2 years but less than 5 years employment, 2 weeks' notice must be given by either party.
* After 5 years but less than 10 years employment, 3 weeks' notice must be given by either party.
* After 10 years but less than 15 years employment, 4 weeks' notice must be given by either party.
* After 15 years employment, 6 weeks' notice must be given by either party.

# *Fixed term Contracts*

In most provinces, the employment/labour standards permit employers to not to give notice of termination for fixed term contracts where the employee has been hired for a specific term or task of 12 months or less, unless the employer is ending the contract before its fixed term.

The exemption from providing notice with a fixed term contract is contingent upon the employment ending at the exact date specified in the contract.

Notice will be required even when there is a fixed term contract if:

* The employee works past the date specified in the fixed term contract period (some legislation allows an employee to work for a short time past the termination date before notice is required)
* The fixed term contract is for longer than 12 months
* The employee is terminated before the date stated in the fixed term contract (in this case the employer might have to pay out the balance of the contract)
* The employee is employed on a succession of fixed term contracts

# *Dismissal with Cause*

Generally, an employer has the right to dismiss an employee for just cause. Just cause can arise from a broad range of circumstances, from criminal conduct to violations of employer policy.

Just Cause is a legal term that means an employer is justified in terminating an employee without providing reasonable notice or payment instead of the notice.

When determining whether there is Just Cause for dismissal without notice in a particular case, courts will look at answering the following two questions:

1. Can the employee misconduct be proven?; and
2. Was the nature and degree of the misconduct sufficient to dismiss the employee without notice?

If the answer to both questions is yes, then there will be Just Cause for the dismissal; however, if an answer to either question is no, then the employer will be obligated to give reasonable notice of termination or payment instead of the notice.

Courts consider several issues when determining Just Cause:

1. Did the employee’s misconduct caused a breakdown in the employment relationship, by either violating an essential condition of the employment contract, or destroying the employer’s inherent faith in the employee?
2. Is the Employee a senior employee in the organization? The more senior an employee is, the more serious the conduct will be considered to be.
3. Did the employer gave a warning before termination? Due Process requires that, with the exception of the most serious acts, the employee deserves warning before termination.
4. Was the employee’s misconduct was tolerated before the dismissal? Where the misconduct occurred in the past, and the employer said nothing about it, the employer would have to have given a warning that such misconduct will not be tolerated before dismissing the employee without notice.

# Notice of Termination is not required in the following circumstances:

Most organizations have a probationary period at the beginning of the employment relationship. However, no province or territory has specific employment standards for 'probationary' employees. All jurisdictions do allow for an employer to terminate the employment of an employee at the beginning of his/her employment without notice or payment in lieu of notice, unless the reasons for termination are because of discrimination as prohibited by human rights codes/acts.

There are other circumstances where an employer has legitimate cause to terminate an employee, if the employee:

* wilfully refused to obey a lawful instruction of the employer;
* has committed misconduct;
* has been so neglectful of duty that the interest of the employer is adversely affected;
* breached a material condition of the contract of service that in the opinion of the director or the Labour Relations Board hearing a complaint, warrants summary dismissal.
* Where the employer pays the equivalent normal wages, including overtime earnings, in lieu of notice (one to six weeks’ pay, depending on the employees length of employment).
* For a lay-off of one week or less.
* The employee is employed for a firm non-renewable term or for a specific task where the term or task does not exceed 12 months and termination doesn't occur before the term or task is completed.
* Where the employer has to terminate as a result of an unforeseen economic or climatic conditions beyond the foreseeable control of the employer, or as a result of a major breakdown or destruction of plant machinery or equipment.
* Where a person has been employed for less than 3 months.

Within 1 week from the date of termination, an employee must be paid:

* all wages owing;
* all vacation pay owing; and
* pay in lieu of notice, if applicable.

Termination with cause may be very difficult to prove in courts and the onus is on the employer to show that the employee's actions were very serious or show a pattern of behaviour.

For long term employees the organization will also have to show that the incompetence or misconduct has not been condoned by a lack of action on the part of the employer over a long period of time

If termination with cause is the result of the progressive discipline process, thorough documentation of the process which shows that progressive discipline was fairly and consistently applied will be needed

If termination with cause is the result of a serious event, the onus will be on the employer to show that a fair investigation of the event took place prior to the termination and that the event was indeed serious enough to warrant dismissal from employment

If the employee had problems - such as alcohol or drug abuse - the employer attempted to accommodate the employee while he or she sought treatment, to no avail

# *Dismissal without Cause*

In most circumstances, an employer must provide written notice of the intent to terminate employment and the termination date. If an employer wants the termination to take effect immediately, most employment/labour standards allow employers the option of payment in lieu of a working notice period (a written notice of termination and the date upon which employee ends is still required).

In a termination without cause, there is no legal obligation for the employer to give a reason. However, when being terminated without cause, most employees want to know why. If you provide a reason, it is important for an employer to be fair and honest about the reason for such a termination. Under no circumstances should an employer allege that it has cause for termination when in fact it does not.

# Frustration of the Employment Contract

Frustration of contract occurs when an employee can no longer fulfill his contract by reasons beyond his/her control. Frustration can occur is the business is destroyed, the raw material required in the manufacturing process dries up or if the employee becomes ill - to the point of being permanently or temporarily incapacitated and unable to return to work to perform their regular duties.

The onus rests on the employer to establish that the contract of employment has been frustrated.

Constructive Dismissal

Constructive dismissal is when there is a fundamental change in the employment relationship that amounts to a dismissal. A claim of constructive dismissal may occur when the employer, without the consent of the employee:

* Significantly reduces an employee's salary
* Significantly changes an employee's benefits
* Makes a significant change to an employee's work location
* Makes a significant change to the employee's hours of work
* Makes a significant change to the employee's authority or responsibilities

An employee must indicate to the employer that he/she is not accepting the change in order to later attempt to assert that he or she has been constructively dismissed.

An employee may make a claim for constructive dismissal to the courts or, in some jurisdictions, to the employment standards authority. In deciding the merits of the case the courts will determine if the change in the employment relationship was so fundamental that it amounted to a termination of employment and, if so, what compensation is appropriate.

Wrongful Dismissal

Wrongful dismissal is a legal claim made before the courts about the cause (in the legal sense) or length of notice/payment in lieu of notice given to the employee when s/he was terminated from employment.

If the claim of wrongful dismissal is justified, then the courts will look at the contract of employment, whether it is in writing or not, and common law or civil law in Quebec, to determine 'reasonable notice' and the appropriate financial compensation in lieu of notice. Under common law 'reasonable notice' has been determined by the courts by looking at things such as: age, profession, experience, length of service, nature of the employment and factors related to the ability of the employee to find similar employment. Common law notice periods and payment in lieu as decided by the courts are often significantly more than the statutory requirements, especially for people in senior management positions.

# Avoiding Wrongful Dismissal

In cases of wrongful dismissal the courts will also look at the way in which the employee was treated before, during and after termination of employment. If the employer did not act in good faith , the amount of damages awarded to the employee may be even greater. Below is a list of things that that employers should do to avoid claims of wrongful dismissal:

1. Become familiar with labour and employment laws. Ignorance of the law may result in some employers inadvertently violating it. Spend time reviewing the law.
2. Develop an employment policy. Research labour and employment laws and develop a company policy regarding the termination of employees. The policy should provide for the circumstances under which the employer can terminate the employment of an employee. Clearly outline penalties for employees that are either underperforming, failing to show up for work, etc. Be sure to follow the policy.
3. Keep good records. Written records of any performance issues with employees will provide the company with a record of any wrongdoing by the employee and provide grounds for termination.
4. Have a written contract. The Employment relationship is governed by legislation, common law, and often by contract. A contract is the easiest and most effective way to deal with many issues which commonly arise in employment relationships. Contract should spell out among other things, probation periods, severance obligations and may contain restrictive covenants.
5. Use great care in terminating an employee. Failure to act in good faith can lead to the court awarding the employee additional damages. Use common sense and common courtesy.
6. Get early legal advice. Good legal advice at an early stage will help avoid a future wrongful dismissal claim. A lawyer can help you determine the reasonable notice period, whether immediate termination or working notice is more appropriate, and how to structure the pay-out. Lawyers can also help craft a Release Form that would be signed by the terminated employee freeing the employer of any further claims.